BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BRIAN K. BOWEN Claimant VS. **MULTIMEDIA CABLEVISION** Respondent AND **CONTINENTAL NATIONAL AMERICAN** Insurance Carrier AND **KANSAS WORKERS COMPENSATION FUND**	Docket No. 180,274

ORDER

Claimant appealed from an Award entered by Administrative Law Judge Shannon S. Krysl dated March 16, 1995. The Appeals Board heard oral argument August 16, 1995.

APPEARANCES

The claimant appeared by his attorney, Stephen Jones of Wichita, Kansas. The respondent and insurance carrier appeared by their attorney, Steven Marsh of Wichita, Kansas, and the Workers Compensation Fund appeared by their attorney, Randall Henry of Hutchinson, Kansas.

RECORD & STIPULATIONS

The Appeals Board has reviewed and considered the record listed in the Award. The Appeals Board has also adopted, for purposes of this appeal, the stipulations listed in the Award.

ISSUES

Claimant asks the Appeals Board to review the findings relating to the nature and extent of claimant's disability. Respondent asks the Appeals Board to review the findings relating to claimant's average weekly wage.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board finds:

(1) Claimant has an average weekly wage of four hundred sixty-two dollars and eighty-six cents ($462.86) and the findings of the Administrative Law Judge on this issue should be affirmed.

The evidence established that claimant earned eight dollars and one cent ($8.01) per hour, an average weekly overtime of seventy-eight dollars and twelve cents ($78.12), and an average weekly fringe benefit of sixty-four dollars and thirty-four cents ($64.34). These wages and benefits combined a total four hundred sixty-two dollars and eighty-six cents ($462.86).

Respondent disputes the inclusion of the fringe benefits. Respondent points out that claimant was offered an accommodated position which would have included the same fringe benefits claimant earned prior to the injury. Respondent argues that the claimant should not benefit from choosing not to accept this employment. Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

K.S.A. 44-511 controls this issue. The average weekly wage is there defined to include "additional compensation" such as the fringe benefits added in this case. The only exception is when those benefits are not discontinued. That addition of the fringe benefits to the wage calculation does not depend, under the statute, upon the reason for discontinuing the benefits, only on the fact of their discontinuance. In addition, the Foulk decision limits the award to functional impairment when the accommodated job offers comparable pay. The wages of the offered job, including the fringe benefits, may also be imputed to the claimant, as they were here, when calculating the wage prong of the work disability test. Wollenberg v Marley Cooling Tower Company, Docket No. 184,428 (Sept. 1995). Elimination of those benefits from the average weekly wage, under these circumstances, overlaps and duplicates the accounting for refusal to attempt the proffered job suggested in the Foulk decision.

(2) The Appeals Board finds claimant is entitled to a permanent partial work disability of nineteen percent (19%).

Claimant was injured on May 12, 1992 when he fell from the roof on which he was working and landed on his feet. The fall caused injury to his low back and to both knees. After emergency room treatment and a few days off work, he returned to light duty for some three (3) to four (4) weeks. He was then returned to his regular duties with help on the more difficult parts of his job. In December 1992 he started having additional problems. Because of the additional problems claimant was referred to Dr. Eyster. Dr. Eyster recommended restrictions and respondent offered claimant his choice of three (3) different positions to accommodate those restrictions. Claimant chose to work as a cablevision service technician. He worked in that position through November of 1993. At that time, Dr. Eyster issued an additional restriction, limiting claimant from climbing poles. Climbing poles was an essential task of the cablevision service technician position. In an effort to accommodate Dr. Eyster's additional restriction, respondent offered claimant a position as a converter repair technician. This position was considered to be within claimant's restrictions and paid seven dollars and ninety-four cents ($7.94) per hour as compared to the eight dollars and one cent ($8.01) per hour claimant had earned prior to his injury. The newly offered position also did not afford overtime while claimant had earned seventy-eight dollars and twelve cents ($78.12) per week in overtime during his pre-injury employment. When claimant rejected the offered position, respondent terminated his employment.

In April, 1994, respondent offered claimant a position which he understood to be the same position he had held before his injury. He testified that he did not request accommodation because his earlier request for accommodation for that position had been denied. The position offered in April would have paid nine dollars ($9.00) per hour.

The Administrative Law Judge found that claimant could have performed the duties offered in the job as a converter repair technician, the position offered in November 1993, which would have paid seven dollars and ninety-four cents ($7.94) per hour with no overtime. The Administrative Law Judge also found that this resulted in a twelve percent (12%) loss or reduction in wage and used twelve percent (12%) as the wage loss component of the work disability test. The Administrative Law Judge refused to impute the nine dollars ($9.00) per hour wage to the claimant, finding that it was offered some five (5) months after terminating his employment and amounted to an offer of his old job without specific accommodations. The Appeals Board agrees because it finds credible the employees who testified that, in their opinion, claimant could not have returned to his former employer within the restrictions recommended.

The claimant would not be limited to functional impairment because the wage of the proffered job was less than ninety percent (90%) of claimant's pre-injury job. K.S.A. 44-510e. Foulk v. Colonial Terrace, *supra*. The Appeals Board does, however, consider it appropriate to consider this proffered wage as what claimant was able to earn.

Mr. Jerry Hardin and Mr. Gary Gammon both testified regarding claimant's loss of ability to obtain and retain employment in the open labor market, giving opinions based upon restrictions recommended by Dr. Eyster and Dr. Blaty. The Administrative Law Judge adopted and gave equal weight to the opinions of each vocational expert based upon the restrictions of Dr. Eyster. He relied upon the restrictions by Dr. Eyster because they were confirmed by an independent medical examination performed by Dr. Mills. Dr. Mills was appointed by the Administrative Law Judge for that medical examination. The Appeals Board agrees with the conclusion reached by the Administrative Law Judge and adopts the finding that claimant has a twenty-six percent (26%) loss of ability to obtain or retain employment in the open labor market.

The Appeals Board also agrees with the decision to give equal weight to the loss of access to the open labor market and the loss of ability to earn a comparable wage. Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990). In giving equal weight to both factors, the Administrative Law Judge found claimant has a nineteen percent (19%) work disability. The Appeals Board agrees with and adopts the findings and conclusions by the Administrative Law Judge relating to the nature and extent of claimant's disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Shannon S. Krysl dated March 16, 1995, is hereby, affirmed.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Brian K. Bowen, and against the respondent, Multimedia Cablevision, and the insurance carrier, CNA, for an accidental injury sustained on May 12, 1992.

The claimant is entitled to 9.43 weeks temporary total disability at the rate of $289.00 per week or $2,725.27 followed by 405.57 weeks at $58.63 or $23,778.57 for a 19% permanent partial general body disability, making a total award of $26,503.84.

As of October 20, 1995, there would be due and owing to the claimant 9.43 weeks temporary total compensation at $289.00 per week in the sum of $2,725.27 plus 170 weeks permanent partial compensation at $58.63 per week in the sum of $9,967.10 for a total due and owing of $12,692.37 which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance in the amount of $13,811.47 shall be paid at $58.63 per week for 235.57 weeks or until further order of the Director.

Pursuant to K.S.A. 44-536, the claimant's contract of employment with their counsel is hereby approved.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent and Workers Compensation Fund to be paid direct as follows:

Barber & Associates	
Deposition of Jerry D. Hardin	$336.00
Deposition of Lawrence R.Blaty, M.D.	$293.80
Transcript of regular hearing	$330.00
Deposition of Curtis Wilson	$140.00
Deposition of Todd Alan Weakley	$170.00
Continuation of regular hearing	$221.65
Deposition of Denis Sean Fraizer	$205.00
Court Reporting Service	
Deposition of Gary Gammon	$232.40
Deposition of Robert Eyster, M.D.	Unknown
Deposition of William C. Hosman	$260.40
Deposition of Carol Martin	$224.10
Deposition of Victor Wilkerson, Jr.	$139.10
Deposition of Philip R. Mills, M.D.	$382.90

IT IS SO ORDERED.

Dated this ____ day of November, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stephen J. Jones, Wichita, Kansas
D. Steven Marsh, Wichita, Kansas
Randall Henry, Hutchinson, Kansas
Shannon S. Krysl, Administrative Law Judge
Philip S. Harness, Director